

TO: PLANNING & REGULATORY COMMITTEE **DATE:** 18 DECEMBER 2024

BY: COUNTRYSIDE ACCESS OFFICER

DISTRICT (S): MOLE VALLEY

ELECTORAL DIVISION:
LEATHERHEAD AND
FETCHAM EAST
Tim Hall

PURPOSE: FOR DECISION

**TITLE: APPLICATION FOR VILLAGE GREEN STATUS.
LAND AT LEACH GROVE WOOD, LEATHERHEAD**

SUMMARY REPORT

The committee is asked to consider whether or not to register the land the subject of this application as a Village Green.

Application for Village Green status by Philippa Cargill dated 22 March 2013 relating to land at Leach Grove Wood, Leatherhead.

The County Council is the Commons Registration Authority under the Commons Registration Act 1965 and the Commons Act 2006 which administers the Registers of Common Land and Town or Village Greens. Under Section 15 of the 2006 Act the County Council is able to register new land as a Town or Village Green on application.

The Council registered the land in the above application as a Town or Village Green on 5 October 2015 following the decision of the Commons Registration Authority on 23 September 2015.

By order of the Supreme Court, the above decision and registration was quashed, and it was ordered that the application for registration be re-determined by the Commons Registration Authority in accordance with the judgment of the Supreme Court.

The recommendation is to REJECT the application.

APPLICATION DETAILS

Applicant

Philippa Cargill and subsequently Timothy Jones

Site

Land at Leach Grove Wood, Leatherhead

Date of Application

No 1869: 22 March 2013.

ILLUSTRATIVE MATERIAL

Annex A	Application Plan
Annex B	2015 Committee Report
Annex C	2016 High Court Judgment
Annex D	2018 Court of Appeal Judgment
Annex E	2018 Update Report to Committee
Annex F	2019 Supreme Court Judgment
Annex G	Supreme Court Order 11.12.2019

BACKGROUND

1. On 25 March 2013 Surrey County Council received an application for a new village green for the land of Leach Grove Wood, Leatherhead. The application was made on the basis that a significant number of inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years. The application was accompanied by 116 evidence questionnaires. The plan at Annex A indicates the land claimed.
2. The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 sets out the process to be followed by any applicant seeking to register a new town or village green ("TVG") and the process to be followed by the Commons Registration Authority.
3. The required consultation and publicity was undertaken and an objection to the application was received from NHS Property Services Ltd ("NHSPS") in its capacity as freehold owner of the application land (the Objector). An independent investigation was conducted in the form of a non-statutory public inquiry held in April 2015. The Inspector's report formed a background paper to the report from the Commons Registration Officer to this committee on 23 September 2015 (Annex B).
4. In his report, the Inspector advised that, because the applicant had not satisfied the neighbourhood test, the application should be rejected. In his opinion there was not sufficient cohesion to form a neighbourhood. The view of this committee was that there was sufficient cohesion to form a neighbourhood and the committee decided to accept the application and register the land as a new TVG.
5. The NHSPS applied to judicially review the decision of this committee and the case was heard in the High Court in June 2016 before Mr Justice Gilbert. The judge found that there was an absence of any consideration or reasoning relating to the question of 'statutory incompatibility'. This means that where land is held by a statutory undertaker or public body for statutory purposes this may be incompatible with the land being registered as a TVG. The argument was that the land was held by NHSPS for health purposes which was incompatible with the land being used for recreational purposes as a TVG. There was statutory incompatibility and for this reason the judicial review was allowed and the decision of this committee was overturned.
6. The original applicant had by now moved out of the area and her application was taken over by Mr Timothy Jones. Mr Jones appealed the decision of the High Court to the Court of Appeal. The appeal was heard in October 2017 and the judgment was published on the 12 April 2018. The Court of Appeal overturned the decision of the High Court judge on the grounds of statutory incompatibility on the basis that the land

was not being used for any “defined statutory purposes” with which registration would be incompatible and confirmed that the land was a TVG.

7. The NHSPS appealed this decision to the Supreme Court. The appeal was heard in July 2019. The majority view was that there was an incompatibility between the statutory purposes for which the land was held by NHSPS and use of that land as a town or village green. As a result, the provisions of the Commons Act 2006 were not applicable in relation to it. The Supreme Court ordered that both the decision to register and the registration of Leach Grove Wood as a town/village green be quashed and the application be re-determined by the Registration Authority in accordance with the judgment of the Supreme Court.
8. In accordance with the Supreme Court Order, Leach Grove Wood was removed from the register of Town and Village Greens and the Countryside Access Officer is now placing this matter before members for re-determination.

CONSULTATIONS AND PUBLICITY

9. Consultation and publicity was undertaken for the application as set out in the Committee Report of 23 September 2015 at Annex B.

HUMAN RIGHTS IMPLICATIONS

10. Public Authorities are required to act, as far as possible, compatibly with the European Convention on Human Rights, enforceable in English Courts by way of the Human Rights Act 1998. The procedure followed and report recommendation are compatible with the provisions of the Human Rights Act 1998.

FINANCIAL IMPLICATIONS

11. If the officer recommendation to reject the application is not followed, the Council is likely to face another application for judicial review. If the Council attempted to re-argue the case, the Council could be penalised heavily in terms of costs.

ENVIRONMENTAL IMPLICATIONS

12. If the land is registered as a village green it will be subject to the same statutory protection as other village greens and local people will have a guaranteed legal right to indulge in sports and pastimes over it on a permanent basis. On registration as a village green, the land must be kept free from development or other encroachments.

ANALYSIS AND COMMENTARY

13. Surrey County Council is the Commons Registration Authority under the Commons Registration Act 1965 and the Commons Act 2006 which administers the Registers of Common Land and Town or Village Greens. Before the Commons Registration Authority is an application made by Mrs Cargill, under the Commons Act 2006 (APP1869), to have land at Leach Grove Wood, Leatherhead (the land), registered as a town or village green (TVG). The land is identified on the plan appended to the application (Annex A).
14. NHS Property Services Ltd, as the freehold owner, opposes the application.

15. To succeed, the Applicant has to prove on the balance of probabilities (*i.e.*, more than a 50% probability) that:
- i. a significant number
 - ii. of the inhabitants of any locality, or of any neighbourhood within a locality,
 - iii. indulged as of right
 - iv. in lawful sports and pastimes (LSP) on the land
 - v. for a period of at least 20 years.
16. The facts were thoroughly tested with evidence at a public inquiry. The report to this committee of 23 September 2015 summarised the Inspector's findings. The Inspector concluded that the Applicant proved that a significant number of inhabitants indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years. However, he did not accept that the locality or neighbourhood within a locality relied upon by the Applicant met the criteria required by the Commons Act 2006 to allow registration of the land as a TVG. The Applicant's claimed neighbourhood was outlined in red on the plan at Appendix 1 to the Inspector's Report, falling within the locality of Leatherhead South ward.
17. The view of this committee was that there was sufficient cohesion to form a neighbourhood and the committee decided to accept the application and register the land as a new TVG.
18. In the Judicial Review proceedings at the High Court (Annex C), the Judge, Gilbert J, agreed that it is a matter of impression whether there is sufficient cohesion for a neighbourhood to exist and decided that there was no criticism of the committee's approach to the issue of neighbourhood. It was an issue on which elected members could have just as much expertise as the Inspector and the finding that there was a neighbourhood was undoubtedly a decision which the committee could reasonably make.

Statutory Incompatibility

19. The Judicial Review claim in the High Court¹ succeeded, however, on the ground that the committee did not consider the question of statutory incompatibility and gave no reasons in respect of this issue. Gilbert J disagreed with the Inspector's conclusion that the doctrine of statutory incompatibility had no application in the case. He set out the relevant test from the Newhaven² case:

'...The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of land for those statutory purposes...'

Gilbert J stressed the need to consider statutory incompatibility on a case by case basis and went on to consider the relevant statutory powers in this case:

¹ R (NHS Property Services Limited) v Surrey County Council and Jones [2016] EWHC 1715 (Admin)

² Newhaven Port and Properties Ltd v East Sussex CC [2015] [para 93]

“...It is clear that there was no general power in any of the relevant bodies to hold land. Land could only be acquired or held if done so for purposes defined in the relevant Acts. The defined statutory purposes do not include recreation, or indeed anything outside the purview of (in summary) the purposes of providing health facilities. Could the land be used for the defined statutory purposes while also being used as a town or village green? No-one has suggested that the land in its current state would perform any function related to those purposes, and the erection of buildings or facilities to provide treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use.”

“Indeed, it is very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village green. A hospital car park, or a clinic would require buildings or hard standing in some form over a significant part of the area used...”

“It is not relevant to the determination of the issue that the land has not in fact been used for the erection of hospital buildings or used for other hospital related purposes. The question which must be determined is not the factual one of whether it has been used, or indeed whether there are any plans that it should be, but only whether there is incompatibility as a matter of statutory construction...”

He concluded that there was a conflict between the statutory powers in this case and registration of the land as a TVG and ordered that the registration of Leach Grove Wood as a town or village green on 5 October 2015 be quashed and the application re-determined in accordance with the judgment of the High Court.

20. The Applicant appealed the decision of the High Court to the Court of Appeal. In the judgment handed down by the Court of Appeal (Annex D)³, Lord Justice Lindblom said:

“The statutory functions on which NHS Property Services relied, and the statutory purposes underlying them, were ... general in character and content: the general functions of a clinical commissioning group to provide medical services to the public, and under section 3(1) of the National Health Service Act 2006, the duty to arrange for the provision of hospital accommodation, as well as various other healthcare services and facilities. The registration of the land as a green under section 15 of the 2006 Act would not, in itself, have any material effect on NHS Property Services’ function under section 223(1) of the National Health Service Act 2006, to hold land for the NHS Surrey Downs Clinical Commissioning Group. Nor would it prevent the performance by the clinical commissioning group, or any other NHS body, of any of statutory function relating specifically to the land in question. Beyond their general application to land and property held by NHS Property Services, none of those statutory functions could be said to attach in some specific way to this particular land. Parliament had not conferred on NHS Property Services or on the clinical commissioning group, any specific power, or imposed any specific duty, in respect of the land whose registration was sought. There was, for example, no statutory duty to provide a hospital or any other healthcare service or facility on the land.”

³ R (Lancashire County Council) v v Secretary of State for Environment, Food and Rural Affairs and R (NHS Property Services Ltd) v Jones [2018] EWCA Civ 721 paras 45 & 46

“...the circumstances did not correspond to those of Newhaven Port and Properties. The land was not being used for any “defined statutory purposes” with which registration would be incompatible. No statutory purpose relating specifically to this particular land would be frustrated. The ownership of the land by NHS Property Services, and the existence of statutory powers that could be used for the purposes of developing the land in the future, was not enough to create a “statutory incompatibility”. The clinical commissioning group would still be able to carry out its statutory functions in the provision of hospital and other accommodation and the various services and facilities within the scope of its statutory responsibilities if the public had the right to use the land at Leach Grove Wood for recreational purposes, even if the land itself could not then be put to use for the purposes of any of the relevant statutory functions. None of those general statutory functions were required to be performed on this land...”

He concluded that the committee was right to accept and adopt the Inspector's conclusion on statutory incompatibility. The Applicant's appeal was allowed and registration of Leach Grove Wood as a TVG was reinstated.

21. The NHSPS appealed to the Supreme Court (Annex F)⁴. The Supreme Court analysed the reasoning in the *Newhaven* case and applied it to the cases before them. In the key passage from the *Newhaven* case, the principle was set out in the following terms:

“...The test as stated is not whether the land has been allocated by statute itself for particular statutory purposes, but whether it has been acquired for such purposes (compulsorily or by agreement) and is for the time being so held..”

22. The Supreme Court held that it was not necessary to show that the land was being used for such purposes only that they are held for statutory purposes. In the case of Leach Grove Wood, they agreed with the assessment of Gilbert J in the High Court and considered that:

"The issue of statutory incompatibility has to be decided by reference to the statutory regime which is applicable and the statutory purpose for which the land is held, not by reference to how it is being used at any particular point in time..."

23. The majority judgment of the Supreme Court was that there was an incompatibility between the statutory purposes for which the land was held and use of the land as a town or village green. The provisions of the Commons Act 2006 were not therefore applicable. The appeal was allowed and the registration of the TVG was overturned.
24. By order of the Supreme Court (Annex G) the registration of Leach Grove Wood as a town or village green was quashed and the decision of 23 September 2015 by this committee to register that land as a town or village green was similarly quashed. The

⁴ R V (Lancashire CC) v Secretary of State for the Environment, Food and Rural Affairs and R (NHS Property Services Ltd) v Surrey [2019] UKSC 58

application is to be redetermined by this committee in accordance with the judgment of the Supreme Court.

CONCLUSIONS

25. The Inspector's conclusions were set out in paragraph 19 of the 2015 committee report⁵ but in summary the Inspector:
- i. rejected the landowner's arguments about statutory incompatibility;
 - ii. accepted the applicant's case that a significant number of the local inhabitants of the claimed neighbourhood falling within the locality of the Leatherhead South ward indulged as of right in lawful sports and pastimes on the whole of the land for the period of at least 20 years ending on or about 9 January 2013; but
 - iii. did not consider that the claimed neighbourhood was a neighbourhood for the purposes of s15 of the Commons Act 2006; and
- concluded that the application to register should be rejected because the applicant had failed to satisfy all the elements necessary to justify the registration of land as a town or village green.
26. It was accepted in the High Court that this committee could form an alternative view on whether there was sufficient cohesion for a neighbourhood to exist.
27. However, the Supreme Court's judgment was that the land should not be registered as a town or village green under the Commons Act 2006 as there is an incompatibility between the statutory purposes for which the land is held and use of that land as a town or village green.

RECOMMENDATION

Officers recommend that the application is **REJECTED** on the grounds that the application should not be registered as a town or village green under s15 of the Commons Act 2006 for reasons of statutory incompatibility in accordance with the judgment of the Supreme Court.

⁵ Annex B

CONTACT

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BACKGROUND PAPERS

The documents relating to Application No.1869:

- i. The application and supporting documentation
- ii. The documents referred to in the report